

IN THE SUPREME COURT OF SWAZILAND
HELD AT MBABANE

CRI. APPEAL NO. 5/2008

In the matter between:

ZWELITHINI DLAMINI

APPELLANT

and

THE KING

RESPONDENT

CORAM: TEBBUTT JA
ZIETSMAN JA
ANNANDALE AJA

JUDGMENT
22/05/2008

ZIETSMAN J.A.

The appellant together with two other men, SIFISO ZWANE and THANDUKWAZI MAGONGO, were originally indicted on two counts, namely murder and robbery. For reasons not explained in the record the charges against THANDUKWAZI MAGONGO were withdrawn and the Crown did not proceed with the robbery charge. In the result there remained only the

charge of murder brought against the appellant (as accused No. 1) and Sifiso Zwane (as accused No. 2).

The appellant and Sifiso Zwane submitted pleas of culpable homicide to the murder charge and these pleas were accepted by the Crown. The two accused were represented at the trial and a written Statement of Agreed Facts, signed by Mr. Fakudze for the Crown and by Mr. Mngomezulu who appeared for the two accused, was submitted to the Court. The facts alleged in the Statement of Agreed Facts were accepted and confirmed by the two accused as being correct. The two accused were duly found guilty of culpable homicide and each accused was sentenced to 8 years imprisonment, backdated to 20 December 2004, being the date of their arrest.

No appeal was noted by Sifiso Zwane. Zwelithini Dlamini, the present appellant, noted an appeal only against the sentence imposed upon him. The appellant argued his appeal before us in person.

The Statement of Agreed Facts reads as follows:

"It is agreed that:

1. The accused persons plead guilty to Culpable Homicide in respect of the count of Murder.

2. The Crown accepts the plea.

3. Regarding the count and/or charge:

3.1. upon or about the 18th December 2004 at or near Mhlaleni New

Village area the accused one or both of them acting in furtherance of a common purpose did unlawfully and negligently bring about the death of one Vusi Ndlela hereinafter referred to as the deceased.

3.2. the accused accept that the deceased died as a direct consequence of their unlawful and negligent joint conduct in as much as the deceased was stabbed once by the second accused person.

3.3. the deceased died due to "*haemorrhage as a result of a penetrating injury to the lung*" inflicted upon his person by the accused person during a quarrel.

3.4. the report on the post mortem examination on the body of the deceased be submitted to form part of the evidence in this matter.

3.5. it was already dark when the deceased met with the accused. A quarrel and a fight ensued as to the right of way and the deceased put up a fight. The second accused who had a knife in his possession then produced it and stabbed the deceased once on the chest. The accused persons then fled the scene leaving (sic) the deceased lying on the ground.

3.6. the accused persons were all arrested on the 20th December 2004 and have been in custody ever since.

When a case has to be decided on a Statement of Agreed Facts it is necessary that sufficient particulars of the event be included in the Statement not only to prove the guilt of the accused, but also to enable the court to determine what will be an appropriate sentence for the committed crime. This is particularly important where more than one accused is involved and where the guilt of one or more of the accused is determined on the basis of common purpose. In order to determine an appropriate sentence for each of the accused the actual role played by each of them in the commission of the offence can be important and should be clearly stated.

In the present case the Statement of Agreed Facts tells us very little of the part played by the appellant. We know that the

deceased was stabbed only once and that the stab wound penetrated the deceased's right lung and caused his death. The blow was delivered by Sifiso Zwane who has not noted an appeal to this Court. What we do not know is what the appellant was doing at the time when the deceased was stabbed. All that we know is that the two accused were "acting in furtherance of a common purpose" when the deceased was stabbed. We do not know whether the appellant was armed with any weapon and it is not stated whether he was aware of the fact that his co-accused was armed with a knife. The Statement of Agreed Facts merely

tells us that Sifiso Zwane "produced it (the knife) and stabbed the deceased once in the chest."

In his argument before us the appellant told us that the deceased and the complainant in the robbery charge were walking one behind the other, and he stated that he was involved more fully in the robbery than in the attack on the deceased. This information is not contained in the record before us. What we do have is simply the statement that it was dark, that the two accused met with the deceased, that there was an argument as to who had the right of way, that the deceased put up a fight and that he was stabbed by Sifiso Zwane. We must, in terms of the Statement of Agreed Facts, accept that at the time when the deceased was stabbed Sifiso Zwane and the appellant were acting in furtherance of a common purpose. The common purpose must refer to the fact that they were then both still involved in the fight with the deceased.

In his submissions to us the appellant emphasised the fact that he did not deliver the fatal blow to the deceased, and the question

arises whether he should have been given the same sentence as Sifiso Zwane. He is a first offender and he was employed by Tex Ray Textiles when he was arrested. He has a minor child 2 years of age.

Sifiso Zwane was at the time of the trial 20 years old. The appellant's age was given as 27 years. The deceased's age, as determined by the doctor who performed the post mortem, is given as "about 29 years".

The trial judge decided to sentence each accused to 8 years imprisonment. He emphasised the fact that a very serious offence had been committed, that such offences are becoming more prevalent and that there seems to be a ready resort to the use of dangerous weapons in committing such offences.

The determination of an appropriate sentence lies within the discretion of the trial court. A court of appeal will only interfere if the sentence imposed by the trial court is substantially different from the sentence it would have imposed, or if the trial court has misdirected itself or has imposed an improper sentence.

In this case, as stated above, we do not know whether the appellant was armed with any weapon. We do not know whether he knew that Sifiso Zwane had a knife in his possession. All that we know is that the two of them, acting together, fought against the deceased and that a blow delivered by Zwane caused his death. Any uncertainty or doubt about the exact role played by the appellant must be decided in his favour.

The fact that a plea of culpable homicide by the appellant was accepted by the Crown indicates that the appellant did not foresee that the attack upon the deceased would cause his death, and the emphasis placed by the appellant, in his argument before us, on the fact that he was not the one who dealt the fatal blow to

the deceased, does suggest that he did not foresee that a fatal blow might be delivered by Zwane.

Taking these circumstances into account it is our conclusion that the sentence of 8 years imprisonment, which is an appropriate sentence for Zwane, is not appropriate for the appellant. In our view his sentence will be appropriate if 3 years of the 8 years are conditionally suspended. The difference between this sentence and the sentence imposed in the court *a quo* is such as to justify interference by this Court.

In the result the appeal succeeds to the extent that the sentence of 8 years imprisonment, backdated to 20 December 2004, is confirmed but with the rider that 3 years of the 8 years are suspended for 3 years on condition that the appellant is not found guilty of murder, or culpable homicide involving an act of violence against another person, or assault with intent to do grievous bodily harm, committed during the period of suspension.

N.W. ZIETSMAN
JUDGE OF APPEAL

I agree

P. H. TEBBUTT
JUDGE OF APPEAL

I agree

J.P. ANNANDALE
ACTING JUDGE OF APPEAL